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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No.———

STATE OF MISSOURI et al., PETITIONERS,

v.

JOHANNA F. FISKE et al., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, State of Missouri and Franklin Miller, Circuit Attorney for the City of St. Louis, Missouri, respectfully show as grounds for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals of and for the Eighth Circuit:

A.

Summary Statement of the Matter Involved.

On the first day of June, 1931, after being duly granted leave to intervene (R. 2), the State of Missouri, one of the petitioners herein, filed an intervening petition in a cause then pending in the District Court of the United States of and for the Eastern Division of the Eastern Judicial District of Missouri wherein it was alleged that in the action then pending in said court the respondents herein were seeking distribution of a trust res over which said court had jurisdiction and that a part of said res should be held in the registry of said court until it was determined by the Probate Court of the City of St. Louis, Missouri, whether or not any inheritance taxes were due the State of Missouri (R. 5, 6).

On the 10th day of June, 1931, respondents filed an ancillary and supplemental bill of complaint for an injunction (R. 7) wherein it was alleged that the petitioner, Franklin Miller, among others, was a duly authorized officer and official of the State of Missouri and that the respondents were each the owner of a vested remainder interest in the trust res hereinbefore referred to; that theretofore the petitioner, State of Missouri, by its duly authorized officials, had filed in the state courts of Missouri an affidavit for citation to require the respondent Gustavus A. Buder, as executor of the estate of Sophie Franz, deceased, to inventory a part of said trust res; that said property was the same property of which respondents were the owners and did not belong to the estate of said Sophie Franz and that said matter had already been determined by the district court and, therefore, prayed that an injunction be granted enjoining the State of Missouri and its officers, including the petitioner, Franklin Miller, Circuit Attorney of the City of St. Louis, from directly or indirectly prosecuting further said citation and from seeking or obtaining any order, decree or judgment in the said state courts.

On the 29th day of June, 1931, the petitioner, State of Missouri, filed its motion to dismiss said bill of complaint for an injunction (R. 13) in that the complaint sought to enjoin the State of Missouri contrary to the Eleventh Amendment to the Constitution of the United States. Thereafter, said district court dismissed the said ancillary and supplemental bill of complaint for an injunction (R. 15). Whereupon respondents failed to plead further and said court on the 3rd day of December, 1931, granted its judgment and decree in favor of petitioners.

An appeal was duly taken by respondents to the United States Circuit Court of Appeals for the Eighth Circuit (R. 18) and on the 26th day of November, 1932, the order of said District Court, sustaining the motion to dismiss the ancillary and supplemental bill of complaint for an injunction, was reversed with directions

(R. 35 et seq.). Whereupon your petitioners, the State of Missouri and Franklin Miller, duly filed a petition for rehearing which on the 17th day of January, 1933, was denied by said Circuit Court of Appeals (R. 44).

By the decision rendered by the Circuit Court of Appeals, said court held that although the State of Missouri had not waived its immunity as given to it by the Eleventh Amendment to the Constitution of the United States (R. 30 et seq.), yet the Eleventh Amendment does not deny jurisdiction to a Federal Court in an action by individuals against a state where the sole purpose and effect of such action is to protect the decrees of the Federal Court entered in a cause wherein it had jurisdiction (R. 35 et seq.).

The fundamental question then is whether or not an *exception* is to be ingrafted upon the Eleventh Amendment to the Constitution of the United States by permitting the courts of the United States to enjoin a state in order to protect the decrees of such courts.

B.

Reasons Relied on for Allowance of the Writ.

Your petitioners contend that a Writ of Certiorari should be allowed and that the decision of the Circuit Court of Appeals should be reversed by this Court for these reasons:

1. The decision admittedly denies to the petitioner, the State of Missouri, rights accrued to it by reason of the Eleventh Amendment to the Constitution of the United States unless an exception is to be ingrafted upon said amendment by means of judicial construction.

2. The decision in ruling and holding that the Eleventh Amendment to the Constitution of the United States does not prohibit an individual from commencing or prosecuting an action against one of the United States in a Federal Court where the sole purpose and effect of such action is to protect the decrees of the Federal Court decides an important question of Federal law which has not been, but should be, settled by this Court since it is

a matter involving the sovereignty of a state of the Union.

3. The decision overlooks applicable decisions of this Court, decisions that hold that in an action brought by an individual against a state of the Union a Federal Court does not have jurisdiction unless by the state's voluntary action it has submitted its rights to judicial determination in the Federal Court. (*Gunter v. Atlantic Coast Line Railroad Co.*, 200 U. S. 273, 26 Sup. Ct. 252, 50 Law Ed. 477; *In re State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516.)

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify to and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9428 (In Equity), Johanna F. Fiske et al., Appellants, v. State of Missouri et al., Appellees, and that the said judgment of the said United States Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

STATE OF MISSOURI,
By ROY McKITTRICK,
Attorney General of Missouri,
GILBERT LAMB,
Assistant Attorney General of Missouri,
POWELL B. McHANEY,
Assistant Attorney General of Missouri,
FRANKLIN MILLER,
Circuit Attorney of City of St. Louis, Mo.,
FOREST G. FERRIS, Sr.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. ———

STATE OF MISSOURI et al., *Petitioners*,
v.
JOHANNA F. FISKE et al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in Johanna F. Fiske et al. v. State of Missouri et al., 62 Fed. (2d) 150 (R. 28). The District Court's opinion (R. 15) was not reported.

II.

Jurisdiction.

(a) The statutory provision believed to sustain jurisdiction is section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. Code, Section 347a.

(b) The judgment and decree sought to be reversed was rendered on the 26th day of November, 1932 (R. 41). Petition for rehearing was duly filed on the 24th day of December, 1932 (R. 41) and on the 17th day of January, 1933, said petition for rehearing was denied (R. 44).

(c) The nature of the case the rulings relied upon as the basis of this Court's jurisdiction are shown in the

petition for certiorari hereinbefore set forth and hereinafter in this brief.

(d) Constitutional provisions, statutes, cases and authorities believed to sustain the jurisdiction of this Court are:

Eleventh Amendment to the Constitution of the United States;
William Duhne v. State of New Jersey et al., 251 U. S. 311;
Hans v. State of Louisiana, 134 U. S. 1;
Hughes Federal Practice, Vol. 5, Sec. 304;
Chisolm v. Georgia; 2 Dall 419;
In re Ayers, 123 U. S. 492;
In the matter of the State of New York, 256 U. S. 490;
Fitts v. McGhee, 172 U. S. 516;
Section 2, Article 3 of the Constitution of the United States;
Story on the Constitution, 5th Ed., Vol. 2, P. 482;
Gunter v. Atlantic Coast Line R.R. Co., 200 U. S. 273;
Hoffman v. McClelland, 264 U. S. 552;
Florida v. Georgia, 17 Howard 478;
Georgia v. Jesup, 106 U. S. 458.

III.

Statement of Case.

(In the interest of brevity, petitioners do not here make a statement of the case since a full statement of the case has been given under heading "A" in their petition for Writ of Certiorari at Page 1).

IV.

Specifications of Error.

The assigned errors intended to be urged are:

1. That the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the order of the District Court dismissing respondents' ancillary and supplementary bill for an injunction on the ground that

the Eleventh Amendment did not deny jurisdiction to a Federal Court in an action by individuals against a state where the sole purpose and effect of such action was to protect the decrees of the Federal Court entered in a cause wherein it had jurisdiction.

2. That the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the order of the District Court dismissing respondents' ancillary and supplementary bill for an injunction for the reason that an injunction enjoining the State of Missouri with others violates the Eleventh Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

Point A.

THE ACTUAL WORDS USED IN THE ELEVENTH AMENDMENT PERMIT NO EXCEPTIONS OF THE KIND AND CHARACTER INGRAFTED UPON IT BY THE LEARNED CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Point B.

THE HISTORY OF THE ELEVENTH AMENDMENT INDICATES THAT ITS OBJECT AND PURPOSE WAS TO PREVENT THE INDIGNITY OF SUBJECTING A STATE FROM BEING SUED AT THE INSTANCE OF PRIVATE INDIVIDUALS.

Point C.

UNLESS A STATE CONSENTS THERETO, IT CANNOT BE SUED BY A CITIZEN OF ANOTHER STATE.

Point D.

THE PETITIONERS IN THE INSTANT CAUSE HAVE NOT WAIVED THE IMMUNITY GRANTED THEM BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR HAVE THEY CONSENTED TO THE JURISDICTION OF THE FEDERAL COURTS.

Point E.

ALL REPORTED AUTHORITY IS OPPOSED TO THE DECISION RENDERED BY THE COURT BELOW.

ARGUMENT.

Point A.

THE ACTUAL WORDS USED IN THE ELEVENTH AMENDMENT PERMIT NO EXCEPTIONS OF THE KIND AND CHARACTER INGRAFTED UPON IT BY THE LEARNED CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Eleventh Amendment to the Constitution provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

It is plain and indisputable from a consideration of the actual words used in the above amendment that the Federal judiciary does not have jurisdiction to entertain a suit in equity brought by a citizen of another state against one of the several states of the United States; and this fact was recognized by the learned Court below (R. 35).

Point B.

THE HISTORY OF THE ELEVENTH AMENDMENT INDICATES THAT ITS OBJECT AND PURPOSE WAS TO PREVENT THE INDIGNITY OF SUBJECTING A STATE FROM BEING SUED AT THE INSTANCE OF PRIVATE INDIVIDUALS.

1. It has been said by this Court that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *William Duhne v. State of New Jersey et al.*, 251 U. S. 311; *Hans v. State of Louisiana*, 134 U. S. 1; *Hughes Federal Practice*, Vol. 5, Sec. 304.

The failure of the makers of our Constitution to make provision for a citizen bringing suit against his own state can be, no doubt, attributed to the fact that the Law of Nations as well as the English Common Law has always been that *a state cannot be sued without its consent. Chisolm v. Georgia*, 2 Dall 419; *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516.

2. But Section 2 of Article 3 of the Constitution of the United States provides that:

> "The judicial powers shall extend to all cases in law and equity arising under this Constitution, the laws of the United States * * *; to controversies to which the United States shall be a party; to controversies between two or more states; *between a state and citizens of another state* * * * and between a state or the citizens thereof and foreign states, citizens or subjects."

and under this provision of the Constitution, this Court in the case of *Chisolm v. Georgia*, 2 Dall 419, held that Chisolm, a citizen of the State of South Carolina, could bring an action in the Federal Courts against the State of Georgia. Whether or not the majority of the Court in that case erred in accepting the literal construction of the above section of the Constitution has long been subject to controversy among jurists and legal theorists. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Hughes Federal Practice*, Vol. 5, p. 223 et seq. But for our purposes, it is sufficient to say that the above decision constituted a new and novel precedent in holding that a state could be sued by an individual. (See cases cited supra.)

3. The decision of *Chisolm v. Georgia* was rendered on the 18th day of February, 1793, and the Eleventh Amendment to the Constitution of the United States was proposed on the 2nd day of December, 1793, and declared adopted on January 8, 1798, thereby indicating

that said amendment was passed in order to overrule said decision of this Court. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Hans v. State of Louisiana*, 134 U. S. 1; *Story on the Constitution*, 5th Ed., Vol. 2, p. 482.

Since a state cannot be sued by one of its own citizens, since the purpose of the Eleventh Amendment was to overrule in effect the decision of *Chisolm v. Georgia* in its construction of Section 2 of Article 3 of the Constitution of the United States, it would appear, therefore, that the purpose of the Eleventh Amendment was to place the several states of the Union, so far as suits *against* them by individuals are concerned, in the same position as they were in before Section 2 of Article 3 of the Constitution of the United States was adopted, i. e., all suits *against* a state are prohibited from being commenced or prosecuted by an individual in tne Federal courts.

Point C.

UNLESS A STATE CONSENTS THERETO, IT CANNOT BE SUED BY A CITIZEN OF ANOTHER STATE.

Until the decision in the instant cause was rendered by the Circuit Court of Appeals, it had been consistently recognized by all courts, in line with the express language of the amendment and its purpose as hereinabove set forth, that the Federal judiciary had no jurisdiction to entertain an action commenced or prosecuted against a state by a citizen of another state. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273; *Hughes Federal Practice*, Vol. 5, p. 223, et seq. Of course, where a state consents to the jurisdiction of the Federal courts and thereby waives the immunity granted it by the Eleventh Amendment to the Constitution, by a long line of decisions, the Federal courts have jurisdiction of such con-

troversies even though they are instituted and prosecuted at the instance of individuals, citizens of another state. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273; *Hughes Federal Practice*, Vol. 5, P. 223 et seq.

Point D.

THE PETITIONERS IN THE INSTANT CAUSE HAVE NOT WAIVED THE IMMUNITY GRANTED THEM BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR HAVE THEY CONSENTED TO THE JURISDICTION OF THE FEDERAL COURTS.

That the petitioners have not waived the immunity granted them by the Eleventh Amendment to the Constitution nor have they consented to the jurisdiction of the Federal courts was freely conceded by the learned Court below (R. 30 et seq.). This ruling of the Court below was correctly predicated upon the theory that the petitioner, State of Missouri, by intervening, sought no determination of any right or title to the stock belonging to the trust res involved in the litigation then pending in such court but desired only to place such stock in the Court's registry to abide the result of the determination of the rights of the petitioners in the state courts —this in line with the decisions of *Hoffman v. McClelland*, 264 U. S. 552; *Florida v. Georgia*, 17 Howard 478; *Georgia v. Jesup*, 106 U. S. 458.

Point E.

ALL REPORTED AUTHORITY IS OPPOSED TO THE DECISION RENDERED BY THE COURT BELOW.

We have heretofore cited pertinent decisions bearing upon the question of the immunity of a state under the Eleventh Amendment—all of them agree that only by a state's consent through waiver or otherwise can a private

individual citizen of another state institute or prosecute an action against a state of the Union in a Federal court, yet the lower Court admittedly enlarged the scope of the amendment (R. 35) to coincide with the rule of law expressed in *Kline v. Burke Construction Co.*, 260 U. S. 226, and similar cases—cases that, in no way, concern the Eleventh Amendment. The rule of law espoused in the Kline case and similar cases depends upon the court *having jurisdiction* of the parties—no such barrier as the Eleventh Amendment to the Constitution stood between the court and the rendition of those decisions.

The Court below also cites as authority for its position the case of *Gunter v. Atlantic Coast L. R. Co.*, 200 U. S. 273, but the decision of that case instead of approving the position of the lower court herein affirms the position of the petitioners herein, for it is there said, l. c. 283:

> "In deciding whether the state and its attorney-general were privies to the Pegues decree, some elementary propositions must be borne in mind.
>
> a. In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, **a state, without its consent, may not be sued by an individual in a circuit court of the United States.**
>
> * * *
>
> c. Although a state may not be sued without its consent, such immunity is a privilege which may be waived and hence, where a state voluntarily become a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment (Clark v. Barnard, 108, U. S. 436, 447, 27 L. ed. 780, 784, 2 Sup. Ct. Rep. 878)."

The Court then concluded that in the Pegues case the state had submitted to the jurisdiction of the Federal Court. The Gunter case and no other case yet decided by any court in the United States has held in accordance with the decision rendered by the lower Court herein.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that this Court should issue a Writ of Certiorari herein.

ROY McKITTRICK,
Attorney-General of Missouri,
GILBERT LAMB,
Assistant Attorney-General of Missouri,
POWELL B. McHANEY,
Assistant Attorney-General of Missouri,
FRANKLIN MILLER,
Circuit Attorney of the City of St. Louis, Mo.
FOREST G. FERRIS, Sr.,
Of Counsel.